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IN THE

Supreme Court of the United States

October Term, 1957

Docket No. ~~1121~~ 221

HARMAR DRIVE-IN THEATRE, INC.,
Plaintiff-Appellant,

against

WARNER BROS. PICTURES, INC. (In Dissolution), *et al.*,
Defendants,

and

PARAMOUNT FILM DISTRIBUTING CORP., *et al.*,
Defendants-Appellees.

COLONIAL DRIVE-IN THEATRE, INC.,
Plaintiff-Appellant,

against

WARNER BROS. PICTURES, INC. (In Dissolution), *et al.*,
Defendants,

and

PARAMOUNT FILM DISTRIBUTING CORP., *et al.*,
Defendants-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, the plaintiffs Harmar Drive-In Theatre, Inc. and Colonial Drive-In Theatre, Inc. and their counsel

Arnold Malkan, pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for review of the judgment of that court filed December 28, 1956, and of the court's order filed March 27, 1957 denying petition for reargument.

Opinions Below

The opinions of the court below and of the Chief Judge dissenting are published at 239 F. 2d 555. The majority and dissenting opinions on rehearing are not yet published. The district court decided in favor of plaintiffs-appellants without opinion. All four of the opinions below are reprinted as Appendix, *infra*, for the Court's convenience.[1]

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1). The order of the Court of Appeals denying petition for rehearing was entered March 27, 1957.

Questions Presented

1. Should an attorney's disqualification, based solely on the fact of his former partnership with a former employee of counsel for defendants, be extended to new causes of action which he was retained to commence against the same defendants long after dissolution of the partnership—because the present plaintiffs had some officers and stockholders in common with plaintiffs in cases brought by the former partnership?

2. May a party appeal denial of its preliminary motion to disqualify adverse counsel?

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[1] All references to the opinions below are marked —a.

All references to (App. —) are references to the Appendix to defendants-appellants' brief in the court of appeals.

Statutes Involved

Rules of the United States District Courts for the Southern and Eastern Districts of New York (Effective March 1, 1952, 16 F. R. S. 906, 908)

"RULE 5: DISCIPLINE OF ATTORNEYS.

* * *

(c) Professional misconduct shall include * * * a failure to abide by the provisions of the Canons of Ethics of the American Bar Association or of the New York State Bar Association."

The *Canons of Ethics of the American Bar Association*:

"CANON 6. ADVERSE INFLUENCES AND CONFLICTING INTERESTS.

* * *

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

Statement of the Case

The District Court denied the motion of some of the defendants herein that Malkan be disqualified as counsel for the plaintiffs. The Court of Appeals reversed and, on rehearing, adhered to its decision. From both decisions Chief Judge Clark dissented.

The basis on which defendants moved to disqualify Malkan in the instant cases and others is his partnership with one Isacson from July, 1952 to July, 1954. Mr. Isacson had worked from November, 1947 to March, 1951 for a firm that represented the eight major motion picture distributing companies in some phases of their activities—mainly in

investigating and collecting fraudulent underpayments of film rentals.

Malkan & Isacson filed motion picture antitrust suits for several different plaintiffs. In one suit the defendants moved to have plaintiffs' counsel disqualified. Eventually, Isacson was disqualified individually on the ground that the files of his former employers contained information relevant to the case. *Fisher Studio* v. *Loew's, Inc.*, 2 Cir., 232 F. 2d 199, *cert. den.* 352 U. S. 836 (1956). The defendants withheld from inspection by Isacson's counsel the documents assertedly containing such information and did not even specify the alleged information. The Court of Appeals criticized the trial judge but held that, in the course of the protracted proceedings, Isacson had waived his constitutional right to be confronted by the evidence. Cf. *United States* v. *Andolsheck*, 2 Cir., 142 F. 2d 503, recently cited by this Court in *Jencks* v. *United States* (June 3, 1957).

In 1954, while the *Fisher* disqualification motion was pending, Malkan and Isacson dissolved their firm. In two cases in which Malkan thereafter appeared individually for the plaintiffs the defendants moved to disqualify him. In one case, with which Isacson had had no connection, Malkan was held qualified. *Austin Theatre, Inc.* v. *Warner Bros. Pictures* (2 Cir.), 224 F. 2d 824, *cert. den.* 350 U. S. 932 (1955). The other case was concededly the same as one in which Malkan & Isacson had filed a complaint before their dissolution. *Laskey Bros. of W. Va., Inc.* v. *Warner Bros. Pictures, Ibid.* Thus, Malkan had been a member of a partnership which had been disqualified in that very case. And, the court held, the subsequent dissolution of the partnership could not "cure his ineligibility to act as counsel in that case". 224 F. 2d at 826-7. At the same time, the court recognized explicitly that Malkan had shown that he had not obtained confidential information from Isacson. *Id.*, p. 827. And, to the same effect, see 9a.

The two instant cases were begun in June, 1955—a year after dissolution of Malkan's partnership. In each case, the plaintiff is a corporation which owns one theatre. These plaintiffs had never retained Malkan's former partner or the former partnership. They first discussed their claims with, and retained Malkan, shortly before the suits were filed (App. 22, 30, 33).

Some, though by no means all, of the officers and stockholders of the instant plaintiffs were officers and stockholders of the plaintiffs in three cases in which, for three other theatres, Malkan & Isacson had filed *pro forma* complaints pursuant to stipulation in the *Fisher Studio* disqualification proceeding, *supra,* then pending, merely to stop the running of the statute of limitations (App. 11).

From the decision of the majority disqualifying Malkan, the Chief Judge dissented on three grounds:

(1) That the District Court's denial of a motion to disqualify adverse counsel was not appealable.

(2) That no basis had been shown to disqualify Malkan, that his disqualification was in conflict with all the prior authorities which had limited disqualification to the "same case" in which the attorney may have been directly or indirectly identified with an adverse party, and, particularly, in conflict with the same court's decision in *Austin Theatre, Inc.* v. *Warner Bros. Pictures,* 224 F. 2d 824, cert. den. 350 U. S. 932, as interpreted by both its author and the commentators as holding the vicariously disqualified partner free, after termination of the partnership, to appear in other cases, for:

> "* * * the only similarity between the issues to be tried in the present two cases and the issues in the cases Isacson started while in partnership with Malkan is the *Paramount* decree, which is of course public property" (11a).

and

(3) That the decision constituted "a club to protect monopolists or harass complainers" (8a).[2]

While explaining the uncertainty of the law of disqualification in the second circuit, the Chief Judge also pointed out that the qualified active members of the court had divided evenly on whether or not to hold a rehearing *in banc* (11a). See pp. 7-8, *infra*.

Reasons for Granting the Writ

The decisions here for review, reversing the district court by a uniquely divided court of appeals (*infra*, p. 7), can have far-reaching effects in three distinct fields of law:

1. The decisions below encroach upon the federal policy against intermediate appeals.

Counsel cannot improve upon the procedural analysis of Chief Judge Clark, one of the distinguished contributors to modern federal procedure. His dissenting opinion, including his important footnotes 2 and 3 (6a-7a), emphasizes that the instant decision accelerates a "trend to debilitate the recognized federal principle against piecemeal appeals" (7a). Judge Clark notes that the majority opinion apparently misreads and gives unwarranted extension to this Court's decision in *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546 (1949), and to a decision in a probate case unique in federal procedure, in disregard of the many federal cases holding interlocutory orders unappealable.

The federal policy against intermediate appeals is curiously intertwined with the federal antitrust laws. This procedural policy protects the small litigant who can ill afford

[2] All references to (—a) are to the appendix hereto.

the expense and delay of multiple appeals. Nowhere is this philosophy more stubbornly resisted than in antitrust litigation, where some defendants seem to find large attorneys' fees a small price to pay for delay. Compare, for example, the practice of attacking antitrust complaints by motions, recently disapproved by this Court in *Radovich* v. *National Football League*, 352 U. S. 445 (1957).

The mere appealability of motions to disqualify may make them effective. Few plaintiffs can stand by an attorney through a protracted hearing and appeal before preparation for trial can begin.

2. The decisions restrict the future of the increasing number of salaried attorneys by exposing them and any attorneys who may associate with them to banishment from the fields in which they may have acquired skill and experience. Any such penalty has traditionally been scrutinized with the greatest care by this Court, which is the protector not only of professional standards, but of the rights of members of the profession. See, to choose some recent examples, *Offut* v. *United States*, 348 U. S. 11 (1954); *In re Levy*, 348 U. S. 978 (1955) (summary reversal); and *Cammer* v. *United States*, 350 U. S. 399 (1956). Careful review is also warranted in this case because of the Court's special responsibility in supervising the administration of justice in the lower federal courts.

Exercise of this Court's supervisory power is especially called for here because of the peculiar division of the court below. Not only did the Chief Judge dissent, but on petition for rehearing, two of the four active qualified members of the court of appeals evidently considered the question of such great importance that they voted to grant the petition and hear the cases *in banc*. This was in spite of the traditionally strong policy of the second circuit against granting either rehearings or hearings *in banc*. Indeed, to

our knowledge, that court has never granted a hearing *in banc*. The unfortunate fact that a majority vote was not obtainable on this question is due to the untimely death of Judge Jerome Frank and the disqualification of another judge (11a). The fact that rehearing was denied only by an equally divided court is, under the circumstances, a reason for, rather than against, granting certiorari.

Formerly, the remedy of disqualification was reserved for the rare instances in which it seemed necessary to protect a former client from the threat of misuse of confidential information acquired by his former attorney. However, a series of disqualification motions made by the motion picture companies have resulted in the following holdings. No showing of any specific confidential information is required to disqualify the former attorney-employee himself. *Consolidated Theatres, Inc.* v. *Warner Bros. Circuit Management Corp.*, 2 Cir., 216 F. 2d 920 (1954). The attorney may be disqualified for having had mere access to information; that is, merely by testimony that his former employer's files contained relevant papers, without production or description of the papers. *Fisher Studio, Inc.* v. *Loew's, Inc., et al.*, 2 Cir., 232 F. 2d 199, *cert. den.* 352 U. S. 836 (1956). Any attorney who might become his partner (and perhaps even his employer or employee) would forever be disqualifiable in any cases in which the disqualified attorney had appeared during the partnership, without being permitted to prove non-receipt of confidential information. *Laskey Bros. of W. Va., Inc.* v. *Warner Bros. Pictures, et al.*, 2 Cir., 224 F. 2d 824, *cert. den.* 350 U. S. 932. Such partner would also be forever disqualifiable even in cases which arise after dissolution of the partnership and which might have come to him in any event, if any relation whatever can be worked out between the cases or the clients. *Harmar Drive-In Theatre, Inc.* v. *Warner Bros. Pictures, Inc., et al.* and *Colonial Drive-In Theatre, Inc.* v. *Same* (the instant cases). In any event, the partner (and any client) must be prepared in every new case to litigate the

matter of disqualification through the court of appeals. *Ibid.* (Instant cases—appealability point.) [3]

The future careers of thousands of employed lawyers and their potential partners, employers, and employees are now shrouded in uncertainty. The decisions below evidently partly or wholly overrule the *Laskey Bros.* and *Austin Theatre* decision, 224 F. 2d 824, *supra*, p. 5, which they profess to follow. The partner was vicariously disqualified in the *Laskey* case without opportunity to prove his non-receipt of confidential information since he had been a member of a partnership which had been disqualified in that particular case, and

> "* * * once a partner is thus vicariously disqualified for a particular case, the subsequent dissolution of the partnership cannot cure his ineligibility to act as counsel in that case." 224 F. 2d at 826-7.

At the same time the Court held in the *Austin Theatre* case that after dissolution the partner was free to handle any new cases against the defendants (since he had rebutted any inference that he might have received any confidential information).

Now the majority below disqualifies the partner vicariously in two cases which came to him a year after the partnership terminated and with which the personally disqualified attorney had no contract. Thus, the *Laskey* rationale for continuing vicarious disqualification is apparently abandoned, along with all or most of the *Austin Theatre* decision that the partner is *not* disqualified in the entire field. The *Laskey* decision may well be justified. It merely excludes a partner from reviving an action in which the disqualified partner had participated. It is the extension of that rule to cases in which the disqualified partner had

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[3] Other recent motions by the motion picture defendants to disqualify other attorneys include *T. C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S. D. N. Y., 1953) and some unreported motions.

no participation which is bad. In the present cases his only connection is the fact that some of the officers and stockholders of the plaintiffs were formerly among the officers and stockholders of clients of his.

In fact, the decisions below can be rested only on the more than dubious grounds which the majority itself appears to have disclaimed; that is, that the knowledge which had been available to the disqualified partner is imputed to all the other members of a partnership of which he was a member. On this point, it may be said first that such a rule would be out of line with all existing rules of trusts and agency.

The majority opinion compares the present situation with that of a self-dealing trustee. But the analogy is very remote, since, by self-dealing, the trustee is doing a wrongful act. He deprives the beneficiary both of the opportunity of making a choice and of the full benefit of his trustee's judgment. The self-dealing trustee would be like an attorney who changed sides *in the same case*. This, of course, is absolutely prohibited because it creates a conflict of interests.

The decisions below could logically be supported only on the ground that the knowledge of his former partner is imputed to Malkan as matter of law and despite a finding of fact to the contrary by the trial judge. But that possible ground was rejected by the court below as the basis of decision.

It is true that the agency rules concerning the imputation of the knowledge of an agent to his principal generally apply to partnerships. But any doctrine of imputation of knowledge is always based on the wrongful conduct of the one to whom knowledge is imputed, that of an agent or partner while acting in the course of his work for the principal. That is not true in the instant cases because it is not claimed that with reference to these cases there has been any wrongful conduct.

And the instant decisions are inconsistent with the rule where the agent of two principals has acquired confidential information from one of them. Thus, where P, a client of an attorney, A, is purchasing Blackacre, P is not charged with information which A had acquired from another client about an equity in Blackacre, provided that A had acquired such information confidentially.

If an attorney's partners are to be forever bound by any knowledge to which he may have had access, without any opportunity of proving that they have not received it, becoming an attorney's partner, or even his employee, will be a hazardous undertaking. Self-protection would require exhaustive cross-examination of the prospective partner or employer concerning former clients. Even this would not furnish complete protection, which could be obtained only by a study of his files and those of his former partners or employers to determine what clients they had represented and in what matters.

Further, if the partner is assumed to have knowledge, his partner in turn may be assumed to be contaminated. Since the rule may logically include all those in the office of the contaminated attorney, the risks of employment by another will become incalculable. It is hoped that not all of these consequences would follow, but the fear that they might would be a serious deterrent to the freedom of attorneys in making associations.

The issue is vital to Government attorneys as well as to those in private practice. For the Government has shown that it may abandon reliance upon the reasonably limited and certain "conflict of interests" statutes in favor of asserting the broadest possible disqualifications under case law. *United States v. Standard Oil Co. (N. J.)*, 136 F. Supp. 345 (S. D. N. Y., 1956).

Perhaps the strongest reason which can be urged for granting this writ is the fact that in the present state of the decisions it is uncertain how far an attorney who en-

ters a firm will be bound by any knowledge to which his partner may formerly have had access.

To hold that he is bound by all such knowledge even after he has left the firm and that he must reject all cases which his former partner could not properly have taken is almost unthinkable. Nevertheless, the present decision leaves the profession in doubt.

It seems vital that the Bar have an authoritative guide for the performance of its professional obligations. The uncertainty created below should not be permitted to stand in the way of time-honored associations among attorneys.

Two of the four qualified judges of the Court of Appeals felt so strongly about this that they urged going against all precedent in the circuit by granting a hearing *in banc*. We urge that this doubt be resolved in the interest of the profession.

3. The Canons of Ethics are being abused as a weapon to "protect monopolists" and "harass complainers" (8a).

Perhaps the greatest danger of the decision below is that it can be used by powerful litigants *in terrorem*. It confers upon defendants undeserved opportunities for collateral litigation. They are empowered to subject to the prolonged scrutiny of the court the past associations of the opposing attorney in every case.

It is characteristic of antitrust actions that defendants are powerful organizations with unlimited resources. The rule announced by the Court gives them a powerful weapon. Plaintiffs, on the other hand, are generally small businessmen who rely upon current receipts and have limited funds for litigation. They can be worn out if enough delay can be caused.

There is no more effective defense in these cases than delay. And there is no more effective means of delay

than the examination of the plaintiffs and their attorneys in disqualification proceedings. Until the attorney has been cleared, preparation for trial cannot begin.

In one of these very cases the defendants have examined the plaintiff at length on conversations with its attorney, which should normally be privileged. See *e.g.*, App. pp. 22-28. Thus, under the guise of protecting their own attorney-client relations, these defendants are infringing upon the attorney-client relationships of their adversaries.

The spate of recent disqualification cases indicates that the danger is real and present. Until a few years ago this type of proceeding was seldom undertaken and then only in serious cases. Since this weapon was discovered by the motion picture industry; it has been used vigorously and remorselessly. It will be increasingly difficult for persons having valid claims in this field to secure competent attorneys bold enough to submit to searching personal attacks, many of which would interfere with their confidential relations with clients.

CONCLUSION

The decision is of material importance to all attorneys throughout the United States. They should know with some degree of definiteness the rules by which their conduct is to be determined. The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

(Opinion of United States Court of Appeals for the Second Circuit, on Appeal)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 38, 39—October Term, 1956

(Argued October 10, 1956 Decided December 28, 1956)

Docket Nos. 24014, 24015

HARMAR DRIVE-IN THEATRE, INC.,
Plaintiff-Appellee,

against

WARNER BROS. PICTURES, INC. (In Dissolution), *et al.*,
Defendants.

COLONIAL DRIVE-IN THEATRE, INC.,
Plaintiff-Appellee,

against

WARNER BROS. PICTURES, INC. (In Dissolution), *et al.*,
Defendants.

Before:

CLARK, *Chief Judge,*
HAND and SWAN, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Sidney Sugarman, *Judge.*

Defendants appeal from an order denying their motion to disqualify plaintiff's attorney and his partner, both individually and as a law partnership, from representing the plaintiff in each of the above entitled treble damage anti-trust suits. Reversed with directions.

BRUCE BROMLEY, *Attorney for Appellants*; JOHN LOGAN O'DONNELL, LEO P. ARNABOLDI, JR., and JOHN S. LUCKSTONE, of Counsel.

ARNOLD MALKAN, *Attorney for Appellees.*

SWAN, *Circuit Judge*:

These appeals bring up an order which denied, without opinion, a motion by defendants to disqualify the firm of Malkan & Ellner and the two lawyers constituting the firm, from appearing for or representing the plaintiffs in two actions each of which claimed treble damages for alleged violation of the anti-trust laws. In three prior appeals similar motions in other anti-trust suits have come before this court.[1]

Before reaching the merits it is necessary to consider whether the order is appealable. This question was not raised in the original briefs of the parties, but at the request of the court supplemental briefs have been filed discussing it. In each of the four appeals mentioned in note 1, *supra*, the court assumed jurisdiction without discussion, other than the brief statement in the *Fisher* case, 232 F. 2d 199, at 204, that "these orders of disqualification are collateral to the main case." In three of the prior appeals

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[1] *Laskey Bros. of W. Va., Inc.* v. *Warner Bros. Pictures* and *Austin Theatre, Inc.* v. *Warner Bros. Pictures*, 224 F. 2d 824, cert. denied 350 U. S. 932; *Fisher Studio* v. *Loew's Incorporated*, 232 F. 2d 199. See also *Consolidated Theatres* v. *Warner Bros. Circuit Management Corp.*, 2d Cir., 216 F. 2d 920, which established the controlling principles.

the court affirmed orders which granted motions to disqualify; in the *Austin* case it affirmed an order which, as in the case now before us, denied the motion. A majority of the court are of opinion that with respect to appealability no distinction exists between orders granting disqualification and those refusing to do so. We think they fall within the class of orders described in *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546 as "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Also closely analogous is *Collins* v. *Miller*, C. A. D. C., 198 F. 2d 948, which held appealable an order denying a motion to remove an administrator because of dilatory and improper administration.

Having concluded that appellate jurisdiction exists, we pass to a consideration of the merits of the appeal. The question is whether the principle of the *Laskey* case, 224 F. 2d 824 or that of the *Austin* case, decided in the same opinion, should be applied to the facts of the present case. In *Laskey* the plaintiff had employed the firm of Malkan & Isacson to bring an anti-trust action in the Western District of Pennsylvania. After the dissolution of that firm, Malkan joined with one Ellner to form the firm of Malkan & Ellner and this firm was employed by Laskey to bring a new anti-trust suit not differing in any material respect, in the Southern District of New York. It was held that because of Isacson's disqualification, his partner Malkan was vicariously disqualified for the particular case, and that the subsequent dissolution of the partnership did not cure his ineligibility to act in that case. In *Austin* it was held that the case came to the new firm of Malkan & Ellner "through channels having nothing whatever to do with Malkan's prior association with Isacson" and "in the absence of any showing that Malkan had received confiden-

tial information from Isacson." 224 F. 2d 824, 827. Consequently Malkan & Ellner were not disqualified to represent Fisher.

In the case at bar it appears that prior to the dissolution of the firm of Malkan & Isacson that firm was engaged by members of the Stern family to bring anti-trust suits in the Western District of Pennsylvania on behalf of three drive-in theatre corporations referred to as "South Park," "Community" and "Blue Dell." The Stern family owned all the stock of these three companies. This family also owned all the stock in "Colonial Drive-In Theatre" and 50 per cent. of the stock in "Harmar Drive-In Theatre," the other 50 per cent. being held by the Rodnok family. Mr. Ernest Stern was an officer of all five of these corporations, and all of them were included in the Associated Drive-In Theatre chain. Shortly after the dissolution of the firm of Malkan & Isacson in July 1954, Malkan & Ellner filed new complaints in the same court on behalf of "South Park," "Community" and "Blue Dell," adding new defendants and increasing the damage claims. Had these new actions been filed in the Southern District of New York it seems clear that the attorneys would be disqualified under the *Laskey* decision. In May or early June 1955, George and Ernest Stern engaged Malkan & Ellner to bring the instant actions on behalf of "Colonial" and "Harmar," respectively. The claims are substantially the same as those in the cases of the other three members of the chain of drive-in theatres. The instant actions were commenced June 30, 1955, and the defendants' motion to disqualify counsel was filed November 15th. It was denied without opinion on December 24, 1955.

This court's decision in the *Laskey* appeal, as we understand it, rested upon the possibility that the partner (Isacson), who had formerly represented Warner Bros. Pictures, had passed on to his partner (Malkan) confidential information that he got from the defendant while representing

it. True, the court spoke of an "irrebuttable inference"; but we take it that what was meant was that a court should not pass upon that issue, just as it will not pass upon the question whether an express trustee who buys the trust res for himself has in fact gotten any advantage in the sale from being a trustee. Thus we think it clear that Malkan was disqualified as an attorney for "South Park," "Community" and "Blue Dell" because he was Isaacson's partner, and that fact prevented Malkan from showing that he had learned nothing from Isaacson. Moreover, if the two plaintiffs at bar were identical in interest with the three just mentioned, we cannot believe that it makes any difference that they are separate corporations. If the beneficial ownership of all the corporations is the same, and the disqualification, imputed to the innocent partner, lasts after the dissolution of his partnership with Isaacson, there is just as much reason to suppose that the defendants at bar will suffer in the defense of the instant actions as in the defense of the other three actions. Therefore, as to "Colonial," which is completely controlled by the Sterns, Malkan is disqualified. As to "Harmar," the situation is not quite so clear. The Sterns owned only half the stock but it was they who engaged Malkan. Under these circumstances we think that the situation called on him to show that the Sterns did not control "Harmar," and this he did not do. We hold him disqualified also in the "Harmar" action.

It is stated in the appellees' brief, without contradiction by the appellants, that the firm of Malkan & Ellner has been dissolved and stipulations have been filed in each of the instant cases substituting Arnold Malkan individually as attorney for the plaintiff. Consequently the defendants' appeals are moot as to the firm.

The order is reversed and the cause remanded with directions to grant the motion in so far as it seeks the disqualification of Arnold Malkan.

CLARK, *Chief Judge* (dissenting):

In form Judge Sugarman's order was quite interlocutory; he merely declined, without stating reasons, to grant defendants' motion for Malkan's summary disqualification.[1] Obviously he was not persuaded by defendants' showing; but there was nothing in his action to prevent him from acting otherwise at any time on a more convincing showing. So we have no more reason to interfere now than we would have as to, *e.g.*, an order refusing to halt discovery before trial. This appeal should therefore be dismissed for want of an appealable order. If, however, we reach the merits, we should affirm, since we, like Judge Sugarman, as yet at least can find no persuasive grounds for the present disqualification.

On the issue of appealability it should be noted that, save for a single somewhat equivocal precedent discussed hereinafter, there is no case actually supporting appealability under really comparable conditions. The cases ordering disqualification have that very element of finality lacking here. And if analogy be sought under the "correlative order" or "offshoot" rule, we must note that these are cases where the courts have found and have emphasized such an element of finality whose clear absence here makes them rather persuasive precedents against our jurisdiction.[2]

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[1] "December 24, 1955 This motion is in all respects denied. It is so ordered. Sidney Sugarman U.S.D.J." As endorsed on the back of the show cause order.

[2] The very quotation set forth in the opinion from *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U. S. 541, 546, directly points the moral; Judge Sugarman's refusal to disqualify Malkan summarily is anything but one of "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

I do not see the analogy here of a case in the (federally) unique probate proceedings of the District of Columbia, *Collins* v. *Miller*, D. C. Cir., 198 F. 2d 948, and think the contrary cases cited in the opinion involving receivers and the like are more in point. See also *Youpe* v. *Moses*, D. C. Cir., 213 F. 2d 613, 616, 617.

I do not think it necessary to cite some of the many cases, such as *United States Plywood Corp.* v. *Hudson Lumber Co.*, 2 Cir., 210 F. 2d 462, holding interlocutory trial orders unappealable.

Even the offshoot rule, in view of its obvious trend to debilitate the recognized federal principle against piecemeal appeals, may require that re-examination which it has not yet received in the light of the amendment to F. R. 54(b), providing a means of appeal in multiclaim cases, and the generous scope given that amendment in *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427, and *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U. S. 445. In fact I have suggested the need for such re-examination in, e.g., *Republic of Italy* v. *DeAngelis*, 2 Cir., 206 F. 2d 121, 132; and I regret that I have not succeeded in persuading my brothers to consider the impact of the amendment here. For it might well suggest a desirable disposition of the problem we face.

But in any event, the present order seems to me to lack finality under any view.[3] The one analogous case looking the other way is that branch of the consolidated decision reported as *Laskey Bros. of W. Va., Inc.* v. *Warner Bros. Pictures*, 2 Cir., 224 F. 2d 824, certiorari denied 350 U. S. 932, which affected the action brought by the Austin Theatre. The opinion therein does not mention appealability (nor was it discussed by counsel), but does affirm district court orders disqualifying Malkan in the *Laskey* case and refusing to do so in the *Austin* case. I was the author of the opinion there and must take whatever blame there is for not using the word "Dismissed," rather than "Affirmed" (the results as to the parties being the same in any event), as to one-half the result reached. But I do not feel too penitent, since experience has taught me that only

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[3] I am glad that my brothers do not rest upon the point argued that by this order affecting trial maneuvers, the judge has somehow declined to grant an injunction against himself; the Supreme Court has now vastly reduced the potency of that form of mythology. *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176; *City of Morgantown, W. Va.* v. *Royal Ins. Co.*, 337 U. S. 254; and see *Wilson Bros.* v. *Textile Workers Union of America, CIO*, 2 Cir., 224 F. 2d 176, certiorari denied 350 U. S. 834. Practically there is no sense in the thought that Malkan must be stopped immediately from disclosing confidential information to the plaintiffs; if anything real is here involved (as to which see discussion below in the text), the information was available and used long ago.

rarely and perhaps fortuitously may an opinion be expected to rise above its sources in the presentations of counsel. Moreover, there were practical grounds for minimizing, if not overlooking, the point; a preliminary order of this court had consolidated the two cases throughout, even to the briefs of counsel, and discussion of the two contrasting situations, suggesting distinctions the court found decisive, was quite necessary if the rationale was to be at all complete. That, I submit, is too precarious a footing upon which to crystallize error.

But passing to the merits I will accept the statement of the issue that our question here is as to which branch of the *Laskey* opinion governs, the *Laskey* rule or the *Austin* rule. Nor will I object to the formulation of the *Laskey* principle of disqualification perhaps beyond that of merely providing against the probable misuse of confidential information by attorneys. In a case where one counsel has represented one side, it is appropriate that his former partners should be disqualified from going over to represent the other side (without consent of course); both dignity of the profession and the need of public vindication of the confidential relationship involved and hence public confidence in its reality so require without more. But such vicarious disqualification of partners should be rather strictly limited to the "same case"; there is no justification for more as either punishment or public vindication of the protected relation; and the dangers of using legal ethics as a club to protect monopolists or harass complainers (as is indeed directly suggested by the long battles on these preliminary issues so assiduously staged by these defendants) suggest care and concern lest we go too far. I think we are doing so here. It is not fortuitous that in every case so far we have affirmed the action of the trial judge: of Judge Goddard in *Consolidated Theatres* v. *Warner Bros. Circuit Management Corp.*, 2 Cir., 216 F. 2d 920, which originally established the principles; Judge Dawson in *Laskey* and *Austin;* and Judge Abruzzo in *Fisher Studio* v. *Loew's Incorporated*, 2 Cir., 232 F. 2d 199, certiorari denied 77 S. Ct. 56. This means that we have found the

"same case" rarely, and elsewhere have accepted the findings of the trial judge either for or against disqualification.

It is evident that my brothers are finding the same case involved where I would not. Actually all these Stern family cases necessarily concern separate claims involving different theatres, different areas of competition, different periods of time. The only definite sameness I find is that all start with the famous Paramount decree. But so does all litigation in this area at the present time. In short what this decision really means is that Malkan is barred from this profitable area of anti-trust litigation for the foreseeable future. This is much, much further than we have gone; in general we have looked for actually the same case; in *Laskey,* for example, it was the same action started in a new district. Defense counsel very shrewdly suggested that here all we had to do to find identity was to look through the corporate control to the real ownership. If that were all, I should of course agree. But it seems to me that even had a single person owned all the theatres here involved, the cases would still not be identical and automatic or vicarious or wholesale disqualification ought not to follow.

Hence I think Malkan, whatever presumption of fact we may apply against him, should be permitted to show he received no confidences of his client's adversary which could be used against the confidant in the pending case. Indeed he convinced Judge Sugarman through affidavit and deposition. While I think the judge quite justified in his conclusion, I would see no objection to asking him to re-examine the facts and give us a detailed finding. But actually I find the situation differing in no matter of substance from that before Judge Dawson in the *Austin* case. If we should reverse here we surely should have reversed there. I find the result here quite unfair to young lawyers attempting to break into substantial practice and undesirable in policy as helping to safeguard monopoly. I think Judge Sugarman's decision should stand until real evidence to the contrary appears.

(Opinion of United States Court of Appeals for the Second Circuit, on Petition for Rehearing)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 38, 39—October Term, 1956

(Petition filed January 12, 1957 Decided March 27, 1957)

Docket Nos. 24014, 24015

[SAME TITLE]

Before:

CLARK, *Chief Judge*, and
HAND and SWAN, *Circuit Judges*.

On Petition for Rehearing

WARREN A. SEAVEY, Cambridge, Mass., *for plaintiffs-appellees, petitioners.*

BRUCE BROMLEY, New York City (JOHN LOGAN O'DONNELL and LEO P. ARNABOLDI, JR., New York City, of counsel), *for defendants-appellants.*

PER CURIAM:

Petition for rehearing denied.

Chief Judge CLARK dissents in separate opinion.

CLARK, *Chief Judge* (dissenting):

In view of the consideration which has been given to the suggestion for a hearing *in banc*, I deem a short note as to the present state of "second circuit law" hereon desirable, notwithstanding the extensive statements in our former opinions now published as 2 Cir., 239 F. 2d 555.

Since one judge has died and another is disqualified, only four judges were available to vote on a hearing *in banc*; as the votes were equally divided, the majority required by 28 U. S. C. § 46(c) for such hearing is lacking. While decision is thus afforded for the present case, it is obvious that precedents for the future must remain uncertain. The majority herein cite and purport to follow the *Laskey-Austin* decision, 2 Cir., 224 F. 2d 824, certiorari denied 350 U. S. 932; and hence it is to be taken as law, even though I feel convinced that my brothers have quite departed from its wording and purpose. And the difficulty is not lessened because, as seems clear to me, careful scholars and judges have interpreted the former decision (for whose apparent ambiguities I have to accept responsibility) as do I. See *United States* v. *Standard Oil Co. (N. J.)*, D. C. S. D. N. Y., 136 F. Supp. 345, 363, 364; Note, 69 Harv. L. Rev. 1339, 1341; Note, 3 U. C. L. A. L. Rev. 105; Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 Harv. L. Rev. 657. This tangled situation must therefore await future development.

I do deem it proper to point out that appellees' brief on the petition for rehearing affords convincing support for my conclusion that the only similarity between the issues to be tried in the present two cases and the issues in the cases Isaacson started while in partnership with Malkan is the *Paramount* decree, which is of course public property. The real issues at trial—competitive conditions in the neighborhood of the present theatres, linking the neighborhood with the national conspiracy, proof of damages—are entirely different in the different cases. Appellees underline this by seeking support for the disqualification by reason of Malkan's unethical solicitation of clients. But only recently we explained with some precision why that should not be a means by which one party can deprive an opponent of his counsel. *Fisher Studio* v. *Loew's Incorporated*, 2 Cir., 232 F. 2d 199, 204, certiorari denied 352 U. S. 836.